SUPREME COURT, U. S.

JUN 20 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

NO. 268

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner,

vs.

GEORGIA, SOUTHERN & FLORIDA RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT	1
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT AND REASON FOR GRANTING WRIT	6
1. There was a "full hearing on the merits" in the District Court:	6
2. The District Court correctly found that Petitioner's construction was a "spur, industrial, team, switching or side" track:	10
3. The alleged changed conditions were not properly before the Court of Appeals, and even if properly before the Court, were irrelevant:	12
4. The Judgment of the Court of Appeals demonstrates a substantial departure from the accepted and usual course of judicial proceedings.	15
CONCLUSION	16
CERTIFICATE OF SERVICE	17
APPENDIX, AND INDEX TO APPENDIX	18

INDEX TO CASES CITED

	Page
Farrell v. Trailmobile, 223 F.2d 697, (5th Cir. 1955)	13, 14
Pennsylvania R.R. v. Reading Company, 132 F.Supp. 616 (E.D.Pa. 1955), affirmed 226 F.2d 958 (3rd Cir. 1955)	11, 12
Texas & Pac. Ry. v. Gulf, Colo. & S.F. Ry. 270 U. S. 266, 46 Sup. Ct. 220, 70 L.Ed. 578	8, 12

INDEX TO STATUTES CITED

28 USCA, Sec. 1254 (1) and 2101 (c)	2
49 USCA Sec. 1(18) - (22)	2, 11, 12, 14

INDEX TO RULES CITED

Rule 60(b), Federal Rules of Civil Procedure	4, 5, 13, 14
Rule 59, Federal Rules of Civil Procedure	9
Rule 57, Federal Rules of Civil Procedure	10

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GEORGIA, SOUTHERN & FLORIDA RAILWAY COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on March 27, 1967.

CITATIONS TO OPINIONS BELOW

The Order Denying Preliminary Injunction And Dismissing Complaint With Prejudice entered by the United States District Court for the Middle District of Florida is reported at (M.D. Fla. 1966) 250 F. Supp. 260. It is printed here as Appendix A. The Opinion of the Court of Appeals is reported at

(C. A. 5th 1967) 373 F.2d 493. It is printed here as Appendix B.

JURISDICTION

The Judgment of the Court of Appeals was entered on March 27, 1967, and is printed as Appendix C. The jurisdiction of this Court is invoked under 28 USCA, Sections 1254 (1) and 2101(c) and Rule 19(1) (b) of this Court.

QUESTION PRESENTED

Where the District Court, after full hearing on the merits, found that Petitioner's construction was a "spur, industrial, team, switching or side" track and that no certificate of public convenience and necessity from the Interstate Commerce Commission is required, did the Court of Appeals in reversing and remanding the cause upon Respondent's claim of changed circumstances, not of record, so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

STATUTORY PROVISIONS INVOLVED

The following provisions, which are quoted in footnote 2 to the Opinion of the Court of Appeals set forth in Appendix B, are involved:

49 USCA Sec. 1 (18), (19), (20), (21) and (22).

STATEMENT OF THE CASE

The essential facts may be best summarized in part by quoting from the Opinion of the Court of Appeals as follows:

"Georgia, Southern and Florida Railway Company (GS&F) and Atlantic Coast Line Railroad Company

(ACL) are two railroads whose lines cross in Jasper, Hamilton County, Florida. ACL runs approximately in a north to south direction, and GS&F runs approximately in a northwest to southeast direction. Somewhat southeast of Jasper and, accordingly, somewhat closer to GS&F than ACL, lies a large area of phosphate deposits. One company, Occidental of Florida, Inc., is now mining those deposits, and another, Owens-Illinois, owns a portion of the deposits but does not mine it.

"Before June 23, 1965, neither ACL nor GS&F had any track running to the phosphate deposits. On that date GS&F began construction of a line of track starting from the GS&F main line at a point about 12 miles southeast of the Jasper crossing, running generally northeasterly for about 5.4 miles into the area of phosphate deposits, and ending at Occidental's phosphate plant. This line was completed in October, 1965.

"GS&F built this track without first obtaining a certificate of convenience and necessity from the Interstate Commerce Commission. 49 USCA §1 (18) requires that a railroad wishing to construct an "extension" to its track obtain such a certificate. However GS&F apparently assumed that its new line was a 'spur, industrial, team, switching, or side' track, and thus exempted from the requirement of the certificate by 49 USCA § 1 (22). (Quoted from Footnote 1 of Opinion)

"On July 19, 1965, less than a month after GS&F started construction of its new track, ACL began construction of a line of track starting at a point on its main line just north of the Jasper crossing and intended to run about 8.5 miles in a generally southeasterly direction. This would have brought ACL also into the area of phosphate deposits. The new ACL line was to end in the area of the deposits owned by Owens-Illinois, at the site of a plant which Owens-Illinois planned to build. This proposed plant site was

about 1.5 miles from the main GS&F track and about 5 miles from the Occidental plant. The GS&F main line actually passes through some of the Owens-Illinois reserves.

"On November 2, 1965, GS&F (plaintiff in the District Court) filed a civil action asking the district court to enjoin the ACL (defendant in the District Court) construction, under 49 USCA § 1(20). GS&F moved for a preliminary injunction, and on the date of the hearing on that motion ACL filed a motion to dismiss for failure to state a claim, with four accompanying affidavits. The court heard testimony from five witnesses and heard oral argument. Several weeks later, on January 27, 1966, the trial judge dismissed the complaint, with prejudice, and made findings of fact and law.

"The plaintiff, GS&F, appealed and the trial judge enjoined ACL to preserve the status quo pending appeal."

Thereafter, the record in the court below was processed and printed. The Appellant's main brief was served May 13, 1966. The Appellee's main brief was served June 2, 1966. Then, on December 29, 1966, less than a month before oral argument in the Court of Appeals set for January 12, 1967, GS&F filed a Motion (in the District Court) to Vacate the Order appealed pursuant to *Rule 60(b) of the Federal Rules of Civil Procedure*, attached to which was an affidavit of counsel for GS&F that stated that he had learned beween November 7 and December 7, 1966, that Owens-Illinois had leased the right to mine its phosphate deposits to Occidental in late October, 1966. (See Appendix E for full affidavit.)

On December 30, 1966, the District Court entered its Order on the Motion to Vacate saying:

"Plaintiff's motion to vacate the Order entered herein on January 27, 1966, is denied, with the recog-

> nition that all matters sought by said motion to be reviewed *may properly be considered by the Court of Appeals.*" (Italics added)

Thereafter, GS&F filed a Reply and Supplemental Brief for Appellant on January 9, 1967, which served the dual purpose of replying to the Brief of Appellee and to call on the Court of Appeals to take notice of its Rule 60(b) motion saying:

> "If, contrary to the specifications of errors in the present appeal, this Court should determine that it would otherwise affirm the order of January 27, 1966, *Appellant submits that this Court nevertheless should still vacate the order on appeal and remand the case to the District Court with directions that it hear Plaintiff's Rule 60(b) motion*[1] *on its merits and, in the light of such hearing, enter a new order.*" (Italics added)

The Court of Appeals did just that: remanded the case without considering the merits. Thus, Respondent injected into the case being considered by the Court of Appeals alleged factual matters (Appendix E) that Petitioner has not yet been heard on or afforded an opportunity to be heard on since the District Court summarily denied the Rule 60(b) motion, *sua sponte.*

Furthermore, the Court of Appeals accepted as prima facie the representation of counsel and called it an "appeal", without an adversary proceeding in the court below, saying:

> "• • • the obvious conclusion from this statement is that the new facts changed the picture by showing

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[1] The motion filed on December 29 with the District Court relied upon five of the six grounds for relief from final judgment enumerated in Rule 60(b):
(1) "mistake, inadvertance, surprise or excusable neglect"
(2) "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial nder Rule 59(b)"
(3) "misrepresentation . . . of an adverse party"
(5) "it is no longer equitable that the judgment should have prospective application"
(6) "any other reason justifying relief from the operation of the judgment."

that if ACL were allowed to build its proposed trackage, that would lead to both ACL and GS&F serving the same customer, Occidental.

"The District Court denied the motion to vacate, and GS&F now appeals that denial. *We consolidate the appeal from this motion and the appeal from the original final judgment. We reverse.*" (Italics added)

That "stroke of the pen" in the Opinion of the Court of Appeals is the departure from "the accepted and usual course of judicial proceedings" for it swept away all the hard fought issues determined by serious judicial labors in the District Court, without a scintilla of judicial safeguards, when no consideration of right and justice required a remand. If a change in facts had actually occurred, the District Court was always open to entertain a new suit for an injunction in which new facts could and would be assessed *in the light of previously determined facts.*

ARGUMENT AND REASON FOR GRANTING WRIT

1. *There was a "full hearing on the merits" in the District Court:*

Since the Court of Appeals refrained from "ruling explicitly on the merits," it should be pointed out that this is a departure from the accepted and usual course of judicial proceedings, and sufficient to call for an exercise of this Court's power of supervision, because Petitioner's victory in the District Court was won at no small cost *and after a full hearing.* Just a brief review of what is shown by the record will illustrate that the District Court reached its decision on the *pleadings and the evidence presented or called forth by the GS&F.* As to such issues there should be no reconsideration on matters not originally before the District Court.

What does the record show?

First of all, the allegations of the complaint (R. 1-8) were sworn to by an officer of the GS&F.

There was also *filed simultaneously* with the sworn complaint a motion for preliminary injunction (R. 34), which *GS&F supported* with further affidavits of Allen H. Douglas (R. 35-50, including exhibits) and Rush Kelso, Senior Assistant Engineer of the GS&F (R. 51-58 including exhibits).

Notice given to ACL the same date (November 1, 1965) of a hearing *to be held* on November 8, 1965, specifically stated, "At such hearing *the plaintiff intends to introduce evidence* in support of such motion" and concluded, ". . . Please govern yourselves accordingly." (R. 71) (Italics added).

At the close of GS&F's presentation of testimony, counsel for GS&F announced to the Court, "That's our case, Your Honor" (R. 247) and no mention was made of any desire to present any further testimony for the plaintiff at any time. Since the timing of the filing of the suit was solely within the control of the GS&F, the District Court was justified in assuming that the GS&F had marshaled and presented all the testimony it desired to put forth to support its prayer for relief.

Following the announcement of counsel of the close of GS&F's case, ACL moved the Court "to direct an order of not guilty, *or enter an order of dismissal*, on the ground that the Plaintiff has failed to make a prima facie case on the complaint." (R. 248) This motion was reserved until the conclusion of all the evidence" by the District Judge, and ACL proceeded to present *live*, the witnesses whose affidavits were offered, and these *live* witnesses were examined by the GS&F to the extent its counsel desired (R. 248-250).

Thus, the fact of the filing of the accompanying affidavits on the morning of the hearing (mentioned by the Court of Ap-

peals) could not have been prejudicial. It was not objected to, in any sense of the word, and actually was treated by the Court and the parties as a proper way to bring forth the facts alleged and relied upon to resist the motion for a preliminary injunction aimed at stopping work in progress which GS&F had known of since July 19, 1965, and which it had not attempted to stop until its own "spur" was finished without a certificate.

At the close of the interrogation of the witnesses called by ACL, ACL renewed its motion for an order of not guilty or a directed verdict or the granting of its motion to dismiss (R. 291), and the Court heard arguments on all the legal and factual issues raised and presented.

Counsel for GS&F, Mr. Bistline, summed up the general feeling of the Plaintiff, the Court, and counsel for Defendant *at that time* in these words:

> "I would like to put in perspective some of the facts that have been—and apply them to the cases, *which is the real decision you have to make here today. By and large, the facts of this case are undisputed.* They have been set in their perspective this morning by the various witnesses, *but generally speaking, there is really no dispute as to the general facts.*" (R. 292-293)

Thereafter, Mr. Bistline argued the merits of GS&F's position relying principally upon the "landmark case" of *Texas & Pacific Ry. v. Gulf, Colo. & S.F. Ry.*, (270 U.S. 266, 46 Sup. Ct. 220, 70 L.Ed. 578).

This expression from Mr. Bistline was in line with an *earlier expression* by the District Judge, to-wit:

> "My impression about this matter is that there is not a great deal of dispute in the factual area, that this hearing will have to resolve itself into a study of the law mainly, and I would hope that most of the facts

> could be agreed to, as many of them can. Of course, we will go on and take testimony and arrive at findings." (R. 157)

That there was "a full hearing on the merits" is also evident from a statement of ACL's counsel, to-wit:

> "I could agree with Mr. Bistline that if they've made a case, the injunction ought to issue; but I strongly disagree with him that they've made a case showing that the Coast Line falls within the prohibition of the Interstate Commerce Act." (R. 306)

It is inescapable that the matter was left with the District Court in a posture which would permit the District Court to either (1) dismiss the complaint on the theory *that under no state of facts shown by GS&F's pleadings and supporting evidence* could an injunction issue, or, (2) in the alternative, that the injunction would issue and a further final hearing would be held (R. 331-339). But that in any event, counsel for ACL would submit proposed findings of fact to the Court promptly (R. 339). This was done.

GS&F's counsel was present at the conclusion of that hearing on November 8, 1965 (R. 339) when counsel advised the Court that ACL would submit such proposed findings of fact, and such proposed findings of fact *(in the exact language ultimately adopted verbatim by the Court)* were prepared and submitted to the Court, *with copy to opposing counsel*, on November 12, 1965, with an accompanying letter, which is attached hereto as Appendix D.

Respondent's counsel made no protest when the proposed Order, submitted by counsel for ACL, was forwarded to U. S. District Judge Bryan Simpson, and no protest was ever made to Judge Simpson *by Petition for Rehearing or otherwise*, as provided by Rule 59 of the Federal Rules of Civil Procedure re-

lating to new trials and amendments of judgments, and counsel did not demonstrate or offer to demonstrate before the District Court, or before the Court of Appeals, any facts which it was precluded from presenting before the District Court.[2]

Since neither the United States, nor any Federal or State regulatory body sought to enjoin any part of ACL's construction in Hamilton County, and GS&F moved only after it's own tracks were completed, it seems clear that if oral arguments had been set in early December, 1966, instead of January, 1967, this case would have been affirmed in the Court of Appeals. Does justice hang by so slender a thread? Can the calendar of the Court of Appeals be the fortitutious dispenser of justice? Is the Record below open until the date of argument? We think not.

2. *The District Court correctly found that Petitioner's construction was a "spur, industrial, team, switching or side" track:*

At the hearing before the District Court, counsel for GS&F stated that it is the only railroad authorized to serve the territory in question (R. 2, 4, 176, 218) and, *in its argument before the court below, insisted that the "main" or "ultimate" issue in this case is "are you invading the territory of another railroad?"* (R. 329, 330). Counsel for ACL stated, throughout the hearing, that GS&F cannot, as demonstrated by this record, prove its "main" contention, i.e., that ACL is invading GS&F territory by the construction of the track in question (R. 78, 161, 163, 243, 263, 306, 317). Thus, *the court below made that the "main" is-*

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[2] Rule 57 of the Federal Rules of Civil Procedure confers broad powers on the District Court which, when timely invoked by a party, are designed to prevent a needless appeal or useless work in connection with a matter as fundamental and as obvious as GS&F claims the omission in this case to have been. The fact is GS&F presented all the evidence that it had and has no other evidence *which it desired to present on November 8, 1965*, or at any time thereafter until the matters raised by the Rule 60(b) motion arose in November or December 1966, a full year after the hearing.

sue in rendering its decision in this case and relied upon the *Pennsylvania-Reading* case[3] as having set forth the guide lines to be considered in cases of this nature.

Respondent places principal reliance upon *Texas & Pac. Ry. v. Gulf, Colo. & S.F. Ry., supra* in contending that Defendant's construction to serve Owens-Illinois is an extension of line necessitating a certificate under Section 1(18) and the extent to which the Interstate Commerce Commission's power was limited under Section 1(22). For example, Mr. Justice Brandeis, in writing the opinion, said:

> "The carrier was authorized *by Congress* to construct, without authority from the Commission, spur, industrial, team, switching or side tracks—to be located wholly within one state—But where the proposed trackage extends into territory *not theretofore served by the carrier*, and particularly where it extends into territory *already served by another carrier*, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory *adequately served by another carrier*, like the establishment of excessively low rates in order to *secure traffic enjoyed by another*, may be inimical to the national interest." 270 U.S. at 277 (Italics added)

Here, we submit, ACL was authorized *by Congress* to construct a spur without authority from the ICC or any other tribunal. In doing so, it extended only into territory *theretofore served* by Coast Line or "territory not already served by another carrier." This the District Court found to be the fact.

The principal evil which Section 1(18) was designed to eradicate was the waste of carrier funds through the building

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[3] *Pennsylvania R.R. v. Reading Company*, 132 F. Supp. 616, (E.D. Pa. 1955), affirmed 226 F.2d 958 (3rd. Cir. 1955).

of unnecessary lines which are undertaken without any hope of a profiitable operation. Such evil is simply not present in the instant case since the record shows that the traffic this track will generate would pay for the entire cost of said track in one year (R. 85, 93). This the District Court found to be the fact.

Cases of this nature must be governed by the facts peculiar to the particular case being considered when applied to legal "guide lines." The *Pennsylvania-Reading* case, *supra*, merely enumerated all such guide lines which had been developed in other cases, including the *Texas-Pacific* case, *supra*, and applied those guide lines to the facts then under consideration. The District Court pursued a similar course of action here.

Application of the tests or guide lines laid down in *Pennsylvania-Reading, supra*, and followed by the court below in the instant case shows that the Defendant properly constructed and should be allowed to continue construction of its track pursuant to Section 1(22) rather than 1(18) of the Act.

3. *The alleged changed conditions were not properly before the Court of Appeals, and even if properly before the Court, were irrelevant:*

On January 6, 1967, (with argument scheduled in the Court of Appeals six days later) GS&F filed a Notice of Appeal in the District Court in an effort to obtain review of the District Court's Order of December 30, 1966, in which the sole specification of error was stated as follows:

> "The District Court erred in declining to hear, consider and grant plaintiff-appellant's Rule 60(b) motion to vacate its Order of January 27, 1966."

The so called "record in this second appeal" was printed as a supplemental appendix to the reply and supplemental brief

of GS&F which was filed in the Court of Appeals on January 9, 1967, and served on ACL the same date.

Included in that "record in this second appeal" was GS&F's memorandum in support of its motion to vacate the Order of January 27, 1966, in which the argument is made, that the Court of Appeals would have no jurisdiction without an indication by the District Court that it would grant the 60(b) motion if the Court of Appeals would remand the case in order that the District Court might reacquire jurisdiction to grant such motion. We submit that counsel for GS&F correctly stated the law in the following quotation from said memorandum:

> "The present motion is filed under Rule 60(b), subdivisions (1), (2), (3), (5) and (6). It is recognized that a Rule 60(b) motion 'does not affect the finality of a judgment or suspend its operation' and that the order involved is presently on appeal. However, pursuant to the procedure approved by the Fifth Circuit, *Farrell v. Trailmobile*, 223 F.2d 697 (5th Cir. 1955), 'the district court retains jurisdiction to consider and deny such motions,' and 'if it indicates that it will grant the motion, the appellant should then make a motion in the Court of Appeals for a remand of the case in order that the district court may grant such motion.' Id. at 699. The same rule is approved in most other circuits. See 7 Moore's Federal Practice, Par. 60.30(2).
>
> "Plaintiff has advised the Fifth Circuit Court of Appeals that if this Court indicates it will grant the present motion, plaintiff-appellant will then make a motion to the Court of Appeals for remand of the case."

But, as the record reveals, the District Court made no such request and the Court of Appeals, having already declined on December 30, 1966, to broaden the appeal by the inclusion of

the Rule 60(b) matters, clearly had no jurisdiction to consider the alleged facts on which the Rule 60(b) motion was based.

If the teaching of *Farrell v. Trailmobile, supra,* is to be applied, "the District Court retains jurisdiction to consider and deny" Rule 60(b) motions and that denial is ineffectual to broaden the jurisdiction of this Court or the issues raised on this appeal to include matters which GS&F was seeking to present and which the Court of Appeals improperly considered. This error is compounded by the fact that the proceedings in the District Court did not follow the usual and accepted judicial procedure but were wholly *ex parte* and *sua sponte*.

Since it is recognized that a Rule 60(b) motion does not affect the finality of a judgment or suspend its operation, the Court of Appeals could properly consider only the matters before the District Court at the time of the entry of its Order of January 27, 1966; not matters it refused to consider nearly a year later.

But even if the question of jurisdiction be glossed over by a coating of opaque judicial power, in the final analysis it is irrelevant to the issues raised by the "main appeal" since the only new fact is that stated by the Opinion of the Court of Appeals as follows:

> "The Rule 60(b) motion alleges facts which, if true, will change the whole face of this action: If Occidental has leased the Owens-Illinois property so that it is the only company mining the phosphate in the area, then ACL would be seeking to build a line to serve a company already served by another railroad."

But under any view of the facts, GS&F would never be precluded from initiating an appropriate original proceeding alleging *that new fact* and claiming its right to an injunction by reason of the failure of ACL to obtain the certificate required by 49 USCA Sec. 1(18).

4. *The Judgment of the Court of Appeals demonstrates a substantial departure from the accepted and usual course of judicial proceedings.*

Regardless of the precatory and advisory language used by the District Court in its Order dated December 30, 1966, denying GS&F's motion to vacate the District Court's Order of January 27, 1966, the fact remains that the motion to vacate was denied. The fact remains that that denial was *ex parte* and *sua sponte*. The fact remains that no issues were joined and no issues were decided in the denial of that motion. The fact remains that the notice of appeal filed January 6, 1967, and the Order of the District Judge of the same date directing the Clerk to transmit to the Clerk of the Court of Appeals "for consideration by such Court of Appeals as it may deem appropriate in the appeal to such Court * * *" do not conform to the essential requirements of appellate proceedings and are therefore substantial departures from the accepted and usual course of judicial proceedings.

Yet, the mere reading of the Opinion of the Court of Appeals discloses that that Court grounded the disposition of the "main appeal" properly before that Court, fully briefed, on the merits, on the strange theory that *if* the factual situation now claimed by GS&F is true, a different result *should have been reached* and therefore the case should be remanded so that the case can be retried, giving the GS&F the benefit of factual developments occurring a full year after the final hearing.

It is unthinkable that the labors of the judiciary and members of the Bar should be so summarily tossed aside, especially where normal and accepted courses of judicial relief were and are still open for the proper consideration of the alleged new facts.

CONCLUSION

This Court should exercise its power of supervision over the United States Court of Appeals for the Fifth Circuit by directing that Court to vacate and set aside the judgment herein sought to be reviewed with directions to consider the merits of the appeal without consideration of the Rule 60(b) motion, or the facts alleged therein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served this .... day of June, 1967, upon the following persons by depositing four copies of same addressed to each in the United States mail with sufficient postage prepaid:

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INDEX TO APPENDIX

Page

A. ORDER DENYING PRELIMINARY INJUNCTION AND DISMISSING COMPLAINT WITH PREJUDICE, entered by District Court Jan. 27, 1965. 18

B. OPINION OF COURT OF APPEALS, 373 F.2d 493 .. 28

C. JUDGMENT, Dated March 27, 1967 39

D. LETTER TRANSMITTING PROPOSED ORDER TO DISTRICT COURT 40

E. AFFIDAVIT OF H. P. OSBORNE, JR. 41

F. ORDER DENYING PETITION FOR REHEARING (March 27, 1967) 45

In the Supreme Court of the United States

OCTOBER TERM 1966

No. _____

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner,

vs.

GEORGIA, SOUTHERN & FLORIDA RAILWAY COMPANY,

Respondent.

APPENDIX A

ORDER DENYING PRELIMINARY INJUNCTION AND DISMISSING COMPLAINT WITH PREJUDICE

(Number and Title Omitted)

Filed: Jan. 27, 1965

The Plaintiff, Georgia, Southern and Florida Railway Company, a Corporation, hereinafter referred to as "GS&F," filed its Complaint herein seeking to enjoin and restrain the Defendant, Atlantic Coast Line Railroad Company, a Corporation, hereinafter referred to as "Coast Line," from constructing approximately 8.5 miles of track in Hamilton County, Florida, contending that such construction would constitute an invasion

of the GS&F territory in violation of Section 1(18) of the Interstate Commerce Act (49 U.S.C. 1(18)).

This Court has jurisdiction under Section 1(20) of said Act and is empowered to determine such facts as are essential to determine whether or not such construction does in fact violate Section 1(18) of said Act, without sending the case to the Interstate Commerce Commission for prior consideration. See *Pennsylvania Railroad Co.* v. *Reading Company,* 132 F.Supp. 616 (E.D.Pa. 1935) and cases therein cited.

The cause was set down before this Court upon GS&F's Motion for a Preliminary Injunction and due notice thereof was given Defendant. When the cause came on for hearing, Coast Line denied that the construction of said tracks falls within the category of an "extension" and affirmatively asserted in its Memorandum in Opposition to Motion for Preliminary Injunction, supported by Affidavits, that the construction was a "spur, industrial, team, switching or side-tracks" permitted under Section 1(22) of the Interstate Commerce Act without the necessity of obtaining a Certificate of Public Convenience and Necessity pursuant to said Section 1(18). In addition, Coast Line challenged the sufficiency of Plaintiff's Complaint by a Motion to Dismiss which has been carried by the Court along with the testimony, evidence and argument on Plaintiff's said Motion for Preliminary Injunction.

Based on such testimony and evidence presented on November 8, 1965, and upon consideration of the Memorandum filed by each of the parties herein, the Court makes the following findings of fact and conclusions of law:

1. Coast Line, and its predecessor companies, have maintained a line of railroad passing through the center of Hamilton County, Florida, in a generally north-south direction since about 1865 and the GS&F has maintained a line of railroad

through said County in a generally northwest-southeasterly direction since 1890. Viewing the railroad tracks which pass through said County like the spokes on a wheel, the "hub" of the two railroads is located approximately in the center of the County at the town of Jasper, Florida, where the tracks cross each other and thereby make a large 135 degree quadrant or sector east of said tracks north and southeast of Jasper within which area lies the majority of the mineable phosphate deposits which private industries are just beginning to recover and produce commercially. Both railroads can extend their tracks from their respective main lines to any point within said quadrant without crossing the other's tracks, at the present time, and Coast Line's construction will not cross GS&F's tracks.

2. Prior to June 23, 1965, neither railroad had extended any line of track into the area of these phosphate deposits (or to any other point in the County) but on that date the GS&F began construction of an extension or spur from its main line at a point approximately 12 miles southeast of the point where the two railroads cross at Jasper, Florida; such turnout being located just south of its agency station known as Genoa and from that point said railroad has constructed and placed in service approximately 5.4 miles of track leading to the phosphate plant of Occidental of Florida, Inc., which has been completed and which began production about October 10, 1965. The construction of this line of track by GS&F was carried out *without* obtaining a Certificate of Public Convenience and Necessity, and GS&F acted under the provisions of Section 1(22) of the Interstate Commerce Act which permit construction of a "spur, industrial, team, switching or sidetrack. . ." without ICC authority. This is the same authority upon which Coast Line also is acting.

3. On or about July 19, 1965, nearly three months prior to the completion of the line of track by GS&F, Coast Line began

construction of the line of track herein sought to be enjoined, knowledge of which construction had been known to GS&F since May of 1965 when rumors thereof came to Allen H. Douglas, Vice-President in charge of Industrial Development for the GS&F. Notwithstanding such knowledge, GS&F made no move to enjoin such construction until the filing of this action on November 2, 1965, and it now asserts that it had no Complaint about such construction *until the construction crossed State Road 6* which travels generally eastwardly from Jasper, Florida. Although Coast Line did not record its Deeds to right-of-way south and east of State Road 6 until September of 1965, GS&F knew, or reasonably should have known, that the Coast Line's construction was directed towards the phosphate deposits on land owned or leased by Owens-Illinois because before commencement of its own construction, GS&F had sought to obtain a right-of-way over the land of Owens-Illinois not only to serve Owens-Illinois but also to reach the Occidental site. Such request for right-of-way was emphatically refused by Owens-Illinois prior to the date GS&F began construction of its tracks on June 23, 1965 and such tracks now reach Occidental from a point south and east of the lands of Owens-Illinois. Thus, GS&F is, for all practical purposes, precluded from entering into and serving the proposed plant even if granted the relief sought.

4. In opposing the Motion for Preliminary Injunction and in support of its Motion to Dismiss, Coast Line relies principally upon facts which will meet the tests set forth in the *Pennsylvania Railroad Company v. Reading Company* case, supra, and the undisputed facts before this Court do show that the construction sought to be enjoined is wholly within one state and would, (1) provide rail service to serve only a single shipper; (2) that it would not provide for passenger, telephone, telegraph, loading platform or station agent service usually indica-

tive of branch line service; (3) that the length of the construction (maximum of 8.5 miles) is not so great under the circumstances so as to be considered in the nature of a branch line; (4) that the tracks will be used only for switching service incidental to line haul movements; (5) that it will not involve special financing or condemnation proceedings; (6) that the costs thereof is reasonable for an industrial spur in light of the traffic involved; and (7), that the Coast Line has been requested by Owens-Illinois to provide the service for a single customer similar to that provided by GS&F for Occidental, or which may be provided for other industries in the same area similarly situated.

5. One additional factor which must be considered and which was considered in the *Pennsylvania Railroad Company v. Reading Company case,* supra, is the question of whether or not the construction of the additional tracks invades the territory of another railroad. This issue must necessarily control the disposition of this case. It is raised by the affirmative allegations in plaintiff's Complaint in these words, to-wit:

> "Plaintiff is the only common carrier by railroad authorized to serve this area." (Par. II) "Defendant does not and has not served the territory south of State Road 6 and east of Plaintiff's line of railroad." (Par. III) "- - - by crossing to the South of State Road 6, would invade territory contiguous to and presently served by, the Plaintiff." (Par. VI)

6. The burden of proving, at least prima facie, the foregoing allegations is upon the Plaintiff and since such allegations themselves constitute conclusions, this Court must look to the facts developed on this issue. It is essential that such allegations be supported by ultimate facts in order to justify the

issuance of a Preliminary Injunction, the granting of which requires a showing of "reasonable certainty of success."

7. In order to meet its burden, and to evidence its claim that the disputed area is *its territory*, GS&F relies upon (1) the physical presence of its 75 year old main line of tracks extending southeastwardly from Jasper, Florida, and along the southwest side of such phosphate deposits; (2) it relies upon a showing that 85 carloads of products were loaded on its cars during the first nine months of 1965 at the stations of Hilcoat, Genoa and Facil; and, (3), it relies upon the fact that at the nearest point, its tracks lie within one and a half miles of the *probable* (but unsettled) location of the Owens-Illinois phosphate plant.

8. Beyond the mere showing of its presence, its close proximity, the movement of forest products from the general area and the completed construction of its own track to Occidental, there is no other evidence that by ICC Order, Court decision or by custom and practice the disputed area has been served *solely and exclusively* as the "territory of GS&F." On the other hand, the undisputed evidence shows that both railroads have been in Hamilton County for over 75 years (Coast Line for 100 years) and there is no evidence that either railroad has ever before extended a spur, industrial, team or switching track to any point in the disputed area, or for that matter to any point beyond a few hundred feet of their tracks. It is undisputed that both railroads have carried forest products out of Hamilton County, Coast Line having loaded 408 carloads during the first nine months of 1965. It is undisputed that some forest products have moved by Coast Line from the disputed area, such as stumps, moved to Brunswick, Georgia, to the Hercules Powder plant. And, it is undisputed that neither railroad has ever moved phosphate shipments out of Hamilton County and that such is "brand new" traffic.

9. Therefore, the quoted conclusions alleged by Plaintiff that it is the only railroad *authorized* to serve this area and that the defendant does not and *has not served* the territory south of State Road 6 and east of Plaintiff's line of Railroad must fail for want of evidential support.

Furthermore, it affirmatively appears from the map filed in evidence by Coast Line that the selection of State Road 6 (as a so-called "territorial boundary" between "exclusive areas" of rail service offered by competing carriers) is itself arbitrary and unreasonable and not supported by any evidence herein because, (1) GS&F has at least a half mile of track which lies east of Coast Line's main line and north of State Road 6; and, (2) the distance from GS&F's main line to the proposed Owens-Illinois plant site is no closer than the distance between the GS&F tracks north of State Road 6 and the point at which the Coast Line's construction intersects said State Road 6.

10. In reaching this conclusion, the Court is not overlooking the single fact that the GS&F main line *is closer to the proposed plant*. But this fact does not make the territory exclusively that of GS&F. The task of this Court would be made easy if this, or any other similar dispute, could be resolved simply by measuring the distance that each competing railroad would have to travel to reach a particular shipper. Furthermore, it affirmatively appears from the testimony and evidence in this case (presented by GS&F) that all offers of GS&F to provide rail service to Owens-Illinois have been rejected by that Company and clearly the tracks of GS&F cannot be extended to the proposed site on the Owens-Illinois property without a Certificate of Public Convenience and Necessity, since such proposed site cannot be reached by GS&F without the condemnation of property and/or the violation of governing tests laid down in *Pennsylvania Railroad Company v. Reading Company*, supra. This Court is not vested with juris-

diction to determine present or future public convenience and necessity, in which event distance might well be a material if not controlling factor. In the absence of such jurisdiction, the Court must conclude that the length of the spur required to reach a given shipper is not controlling on the question of invasion of territory.

11. From the cases cited both by Plaintiff and Defendant, dealing with disputes as to whether a particular track is permitted by paragraph 1(22) of the Interstate Commerce Act as a "spur, industrial, et cetera," all fail to suggest that Congress intended the relative effect of railroad competition to influence the determination of the question of invasion of territory when raised in an enforcement proceeding in the District Court, in the absence of an ICC Order. The right of Owens-Illinois to prefer one carrier over the other, in seeking rail service, is unlimited and if such preferred carrier can provide such service without violating the established tests mentioned in the *Pennsylvania Railroad Company v. Reading Company* case, supra, the remedy (if any) of the aggrieved carrier does not lie in the District Court.

12. To summarize, it might be said that the only issue before this Court and over which it has jurisdiction is the characterization of the track in question and where, as here, the record establishes the fact that both railroads have served the area in question on the same basis prior to the commencement of construction of lead tracks to transport a new product, such tracks by each railroad to serve different and competing industries must be said to merely continue the competitive relationship found previously existing and would not result in the invasion of territory by either carrier.

13. For the reasons hereinabove stated, this Court concludes that Plaintiff's Complaint and the evidence and testi-

mony presented in support thereof, when resolved in a light most favorable to the Plaintiff, fails to establish even prima facie the allegations of invasion of territory. It follows that there is no probability of success and that said Motion for Preliminary Injunction should be denied and said Motion to Dismiss should be granted.

Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff's Motion for Preliminary Injunction should be and the same is hereby denied, and Defendant's Motion to Dismiss should be and the same is hereby granted, with prejudice, at the cost of the Plaintiff.

DONE AND ORDERED at Jacksonville, Florida, this 27 day of January, A.D. 1965.

(Signed) BRYAN SIMPSON
DISTRICT JUDGE

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23461

GEORGIA SOUTHERN AND
FLORIDA RAILWAY COMPANY,
Appellant,

versus

ATLANTIC COAST LINE
RAILROAD COMPANY,
Appellee.

Appeal from the United States District Court for the Middle District of Florida.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

(February 16, 1967).

Before TUTTLE, Chief Judge, and BELL and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge: Georgia Southern and Florida Railway Company (GS&F) and Atlantic Coast Line Railroad Company (ACL) are two railroads whose lines cross in Jasper, Hamilton County, Florida. ACL runs approximately in a north

to south direction, and GS&F runs approximately in a northwest to southeast direction. Somewhat southeast of Jasper and, accordingly, somewhat closer to GS&F than ACL, lies a large area of phosphate deposits. One company, Occidental of Florida, Inc., is now mining those deposits, and another, Owens-Illinois, owns a portion of the deposits but does not mine it.

Before June 23, 1965, neither ACL nor GS&F had any track running to the phosphate deposits. On that date GS&F began construction of a line of track starting from the GS&F main line at a point about 12 miles southeast of the Jasper crossing, running generally northeasterly for about 5.4 miles into the area of phosphate deposits, and ending at Occidental's phosphate plant. This line was completed in October, 1965.[1]

On July 19, 1965, less than a month after GS&F started construction of its new track, ACL began construction of a line of track starting at a point on its main line just north of the Jasper crossing and intended to run about 8.5 miles in a generally southeasterly direction. This would have brought ACL also into the area of phosphate deposits. The new ACL line was to end in the area of the deposits owned by Owens-Illinois, at the site of a plant which Owens-Illinois planned to build. This proposed plant site was about 1.5 miles from the main GS&F track and about 5 miles from the Occidental plant. The GS&F main line actually passes through some of the Owens-Illinois reserves.

On November 2, 1965, GS&F filed a civil action asking the district court to enjoin the ACL construction, under 49 USCA

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1 GS&F built this track without first obtaining a certificate of convenience and necessity from the Interstate Commerce Commission. 49 USCA §1(18) requires that a railroad wishing to construct an "extension" to its track obtain such a certificate. However, GS&F apparently assumed that its new line was a "spur, industrial, team, switching, or side" track, and thus exempted from the requirement of the certificate by 49 USCA §1(22). See footnote 2, infra.

§1(20).[2] GS&F moved for a preliminary injunction, and on the date of the hearing on that motion ACL filed a motion to dismiss for failure to state a claim, with four accompanying

2 49 USCA §1(20) reads:
"The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."
GS&F claimed that ACL was violating §1(18), which reads: "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."
ACL answered that it came in under the exception in §1(22), which reads: "The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation."
§1(19) covers the mode of applying to the I.C.C. for the certificate.

affidavits. The court heard testimony from five witnesses and heard oral argument. Several weeks later, on January 27, 1966, the trial judge dismissed the complaint, with prejudice, and made findings of fact and law.[3]

The plaintiff, GS&F, appealed and the trial judge enjoined ACL to preserve the status quo pending appeal.

After submission of the briefs on appeal, and less than a month before oral argument, GS&F filed a motion asking the district court to vacate its final judgment under Fed. R. Civ. P. 60(b). An attached affidavit by counsel for GS&F stated that he had just learned that Owens-Illinois had leased the right to mine its phosphate deposits to Occidental. The obvious conclusion from this statement is that the new facts changed the picture by showing that if ACL were allowed to build its proposed trackage, that would lead to both ACL and GS&F serving the same customer, Occidental.

The district court denied the motion to vacate, and GS&F now appeals that denial. We consolidated the appeal from this motion and the appeal from the original final judgment. We reverse.

I.

The trial court, in granting the motion to dismiss for failure to state a claim, considered matters outside the pleadings; therefore the motion must be considered as a motion for summary judgment.[4] F.R. Civ. P. 12(b) reads in part:

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3 That opinion is reported at 250 F.Supp. 260 (1966).

4 Finding 13 reads:

"For the reasons hereinabove stated, this Court concludes that Plaintiff's Complaint and the evidence and testimony presented in support thereof, when resolved in a light most favorable to the Plaintiff, fails to establish even prima facie the allegations of invasion of territory. It follows that there is no probability of success and that said Motion for Preliminary Injunction should be denied and said Motion to Dismiss should be granted."

> "If, on a motion asserting the defense . . . [of dismissal] for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion *shall* be treated as one for summary judgment and disposed of as *provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*" [emphasis added]

Rule 56(c) provides in part:

> "The motion [for summary judgment] *shall be served at least 10 days before the time fixed for a hearing.* The adverse party prior to the day of hearing may serve opposing affidavits. . . ." [emphasis added]

The motion to dismiss and its accompanying affidavits were filed the morning of the hearing on the motion for preliminary injunction. The parties and the trial court treated this hearing as limited to the question of whether the preliminary injunction should issue. The trial judge opened the hearing by saying:

> "Good morning. This is No. 65-349-Civil-J. *It comes on plaintiff's . . . motion for preliminary injunction.* . . ."

At the close of the hearing, in the course of setting a bond should a preliminary injunction later be issued, the trial court indicated again the limited nature of the hearing:

> "Well, it would seem to me that the case can be reached and disposed of on final hearing, . . . that it could be heard on final hearing within three or four months. . . ."

Nothing said before the hearing indicated that a summary judgment, a final judgment, might result from it.[5] There was no prior notice of the nature of the hearing; there was no notice that affidavits would be filed. In fact, the hearing itself provided no notice of how the oral testimony and affidavits would later be used.[6] The first indication that this material would be used to support a summary judgment was the judgment itself. In sum, there was no hearing on summary judgment at all. The case falls squarely within the rule of *Enochs v. Sisson*, 5 Cir. 1962, 301 F.2d 125, where we held it an abuse of discretion to grant summary judgment without proper notice and hearing as required by Rule 56.

In *Enochs*, we cited *Bodidge v. Lehman*, 6 Cir. 1958, 252 F.2d 336. That case says in part:

> ". . . Rule 56(c) provides that a motion for summary judgment requires service 'at least 10 days before the time fixed for the hearing.' We think the spirit of the rule requires the same notice and hearing where the

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5 We are impressed with the following oral remark made by counsel for GS&F in support of the motion for an injunction pending appeal.

"I point out also that in the third ground we have stated that at no time in these proceedings did the Court indicate or even intimate that the plaintiff would be deprived of an opportunity to fully develop their case upon a final hearing. Quite frankly I would have to submit to candor that my impression was distinctly to the contrary, that I thought that the philosophy of this Court was to permit a full and final hearing upon the merits of this type of controversy." R. p. 344.

6 Cf. *Chan Wing Cheung v. Hamilton*, 1 Cir. 1962, 298 F.2d 459, 460: "Moreover, receiving evidence at the hearing, as distinguished from affidavits or depositions normally required to be filed 'at least 10 days before' Rule 56(c)), may place the opposing party in an unfair position. There is a substantial difference between accepting matters at the hearing which show that an issue of fact exists, and taking evidence in support of the motion at the last minute when there is no opportunity to rebut."
The First Circuit doubts the propriety of oral evidence in support of summary judgment even at a hearing with proper notice. A fortiori its use to support summary judgment is more dubious in the present case, where there was never notice of how it would be used, and accordingly no true opportunity to rebut it. See 6 Moore, Federal Practice §56.11[8] at 2206 (2d Ed. 1965).

> court contemplates summary dismissal on its own motion. Since attorney for appellants was given neither notice nor opportunity to be heard upon the question of summary dismissal the judgment was erroneous." 252 F.2d at 368-9.

See *Ullah v. Hoy*, 9 Cir. 1960, 278 F.2d 194.

The notice and hearing requirements of Rules 12(b) and 56(c) are far more than formalities. GS&F was cut off from opportunity to present rebutting evidence and argument relevant to the issue of summary judgment. Stated most baldly, GS&F lost its case without a full opportunity to be heard. ACL's argument that the hearing on preliminary injunction effectively presented all of the issues which GS&F could or would have presented at a hearing on summary judgment is inapposite, for loss of a motion for preliminary injunction means only temporary lethality. Final judgment is not then a possibility. When such a limited adjudication is the order of the day, we cannot say with assurance that the parties will present everything they have. The very intimation of mortality when summary judgment is an issue assures us that the motion will be rebutted with every factual and legal argument available.

The notice requirements of Rule 12 guarantee that the automatic change of a motion to dismiss into a motion for summary judgment will not be accomplished by an unforeseeable thrust with no chance to parry. Notice is ascendant and primary in the Federal Rules. They do not tolerate foils of obfuscation.

II.

The trial court held, on the merits, that the new construction of ACL was a "spur, industrial, team, switching or side" track

under 49 USCA §1(22)[7] and that, therefore, ACL need not seek a certificate of public convenience and necessity from the Interstate Commerce Commission to build it, as is ordinarily required for building an "extension" under §1(18).

The Rule 60(b) motion alleges facts which, if true, will change the whole face of this action: if Occidental has leased the Owens-Illinois property so that it is the only company mining the phosphates in the area, then ACL would be seeking to build a line to serve a company already served by another railroad. As we hold that the cause must be reheard, we need not rule on whether GS&F's new allegations alone would justify a Rule 60(b) motion for a new trial. We assume that the matter alleged in the Rule 60(b) motion will be introduced on remand; and because we do not know what effect the new evidence may have, we refrain from ruling explicitly on the merits.

However, we feel it proper to say that the trial court's almost exclusive reliance on *Pennsylvania R. Co., v. Reading Co.*, E.D. Pa. 1955, 132 F.Supp. 616, aff'd per curiam 3 Cir. 1955, 226 F.2d 958, is misplaced. That case used eight "tests," distilled from former cases construing §1(22). These tests have no statutory basis, and were developed for a case different from the one before us. But the present case adopts those tests as an exclusive, controlling list of the relevant considerations. We think that the tests are, at most, helpful factors to be considered, and not fiats to be bound by. We disapprove of rubricating such "tests" into talismans of magical power.[8]

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7 See Footnote 2, supra.

8 Professor Chafee, in discussing Hart v. Leonard, E & A 1886, 42 N.J. Eq. 416, 7 Atl. 865, said:

"Justice Dixon [who had attempted to classify and make an exclusive list of situations when equity could by injunction protest and enforce rights in real estate] was attempting to apply in law the logical method of elimination or exclusion, which always charmed us in plane geometry. If the line AB is unequal to CD, it must be so in either of two ways, greater or less.

We invite the court's attention instead to the classic opinion of Mr. Justice Brandeis in *Texas & Pacific R. Co., v. Gulf, Colorado, & Santa Fe R. Co.*, 1926, 270 U.S. 266, 46 S.Ct. 220, 70 L.Ed. 578. Justice Brandeis said in part:

> "A truer guide [for courts] to the meaning of the terms extension and industrial track, as used in ¶¶18 to 22, is furnished by the context and by the relation to the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter

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Then we prove it cannot be greater and it cannot be less. Therefore it is not unequal, and AB=CD. The difficulty is that this method is sound only when the classification is exhaustive. The list of excluded possibilities must include all the possibilities, and of this we can rarely be sure in less exact sciences than mathematics. We know that there are only two kinds of inequality, but Justice Dixon could not be sure that there were only nine kinds of equitable relief, especially when he had failed to go outside New Jersey to search for a tenth category. It is the same fallacy into which Darwin fell in attributing the parallel roads of Glen Roy to the action of the sea, because no other explanation he could think of was possible. Then Agassiz propounded his glacier-lake theory, which Darwin had neglected to consider. And, he adds, 'My error has been a good lesson to me never to trust in science to the principle of exclusion.'

"This question of Hart v. Leonard is very important, for it shows the danger in our system of law which has grown up from concrete cases rather than from abstract reasoning, of using precedents as principles per se and not as illustrations of principle. Equity relieves against torts when the remedy at law is inadequate. It was inadequate in Dixon's nine classes, and may be equally so in a dozen new classes. Of course a different system of law, which is rooted in logic and not in experience, must be on the watch for altogether different dangers."

Professor Chafee has this footnote appended to the internal quotation from Darwin:

"Life and Letters of Charles Darwin, 57 (ed. 1901). I have heard a thoughtful woman argue against gambling thus: There are four ways to obtain money, earning, finding, receiving a gift, stealing. Gambling is neither of the first three. Therefore it is the fourth."

Chafee, Progress of the Law-Equitable Relief Against Torts, 34 Harv. L. Rev. 388, 391-2 (1921).

of national concern that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. The Act sought, among other things, to avert such losses.

"When the clauses in ¶¶18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks . . . to be located wholly within one state.' Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier . . . But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the pro-

posed trackage constitutes an extension of the railroad within the meaning of ¶18, although the line be short, and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it cannot be built unless the Federal commission issues its certificate that public necessity and convenience require its construction. . . ." 270 U.S. at 277-79, 46 S.Ct. at . . . , 70 L.Ed. at 583-4.

REVERSED and REMANDED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23461

D. C. Docket No. CA 65-349 Civ-J

GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY,
Appellant,

versus

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before TUTTLE, Chief Judge, and BELL and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Atlantic Coast Line Railroad Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as Mandate:
Mar. 27, 1967

APPENDIX D

November 12, 1965

Honorable Bryan Simpson
United States District Judge
Federal Building
Jacksonville, Florida

My dear Judge Simpson:

Re: Georgia Southern and Florida Railway Company v. Atlantic Coast Line Railroad Company; Civil Action No. 65-349-Civ-J.

As indicated at the conclusion of the arguments following the hearing on the above matter, I now hand you Coast Line's suggested Order, including findings of fact which we believe is strongly supported by the testimony and the evidence, resolving conflicts in a manner most favorable to Plaintiff.

In addition, we have asked the Court Reporter, Mr. Sheridan, to provide you with a copy of the transcript of proceedings and if it has been completed by Friday morning, that also will be attached. Otherwise, Mr. Sheridan will deliver that to you.

Finally, in view of your question regarding the necessity for showing irreparable harm, we did a bit of research to satisfy ourselves that a showing of irreparable harm is necessary at every stage *prior to* a final hearing on the merits, and a supplemental memorandum on that point is also attached, in case the Court concludes that our suggested Order and findings of fact is not acceptable.

Copies of the above mentioned documents are being sent to opposing counsel.

William H. Maness

WHM:sh

cc: H. P. Osborne, Jr., Esquire
1530 American Heritage Life Building
Jacksonville, Florida 32202

APPENDIX E

Affidavit

STATE OF FLORIDA
COUNTY OF DUVAL

H. P. OSBORNE, JR., being duly sworn, deposes and says:

1. My name is H. P. Osborne, Jr. I am a partner in the law firm of Mathews, Osborne & Ehrlich who are counsel of record for the Georgia Southern and Florida Railway Company, plaintiff in the above entitled cause, and hereinafter referred to as GS&F.

2. On or about November 7, 1966, I was notified of the existence of an article appearing in an edition of the newspaper, The Florida Times-Union, on October 28, 1966, and another article appearing in an edition of the same paper on October 29, 1966, both of which articles indicated that Owens-Illinois, Inc. had granted to Occidental Corporation of Florida or Occidental Agricultural Chemicals Corp. leasehold rights to mine 40,000 acres of land located in Hamilton County, Florida. Very shortly thereafter arrangements were made to have the public records of Hamilton County, Florida, examined to confirm the existence of such a lease and to ascertain exactly what lands were involved. No such lease was discovered in such public records. In a telephone conversation with legal representatives of the lessee or lessees, to-wit: partners or associates of the law firm of Holland, Bevis, Smith, Kibler and Hall as late as December 8, 1965, I was informed that there was in existence a lease by Owens- Illinois of the general nature as outlined in these newspaper articles and that in due course some evidence thereof describing the exact lands leased would be recorded in the public records of Hamilton County, Florida. As late as December 16, 1966, no such evidence I am informed had been so recorded.

3. On or about December 7, 1966, there came to my attention *Progress Report*, dated November 15, 1966, and issued by Occidental Petroleum Corporation to its Shareholders. At pages 4 and 5 of said *Progress Report*, the following is printed:

"Acquisition of Owens-Illinois Phosphate Tract—Northern Florida"

"Your company has taken another major step to expand its phosphate fertilizer operations in northern Florida.

"During the development of our Suwannee River mine with its exceptionally high quality of phosphate rock, intensive exploration on adjacent lands was begun by several other companies. It became apparent to your management that it would be to your company's benefit to acquire control of as much of these additional reserves as possible. Negotiations were begun with Owens-Illinois, Inc., the largest holder of lands adjoining our mine, and late in October your company concluded an agreement for the leasehold rights to mine phosphate rock from approximately 40,000 acres belonging to this company. Owens-Illinois had done extensive prospecting on approximately 10,000 acres of its properties, and independent mining engineers employed by them have estimated that there are 77,600,000 tons of high-grade phosphate rock concentrate contained in the property. Under the lease, which covers a 40-year term, Occidental will pay a royalty on the phosphate as it is mined with certain minimum payments beginning next year. Including approximately 84 million tons of phosphate rock concentrate which our original tract is estimated to contain, your company now owns or controls under lease approximately 161 million tons of high grade phosphate. Both of these properties can be mined and the rock processed through our present chemical complex."

4. Accompanying the foregoing Occidental *Progress Report* to its stockholders was an 8-page brochure by Kerr & Company, Engineers, dated November 16, 1966, and entitled "Occidental Petroleum Corporation." At page 5 of this brochure, it is stated:

> "Late in October, 1966, Occidental announced that an agreement had been made with Owens-Illinois covering leasehold rights to mine phosphate rock from approximately 40,000 acres adjoining Occidental's present mine area in Hamilton County, Florida. Based on initial prospecting, the amount of phosphate rock in the lands subject to the lease has been estimated by independent engineers employed by Owens-Illinois to be at least 77,600,000 tons of saleable concentrate of 71 per cent BPL rock."

5. Comparing the foregoing statements, made by or for Occidental, with Exhibit A attached to the October 30, 1965, affidavit of Allen H. Douglas in this proceeding, I conclude that the leasehold rights acquired by Occidental (the parent corporation or one or more of its subsidiaries) from Owens-Illinois in Hamilton County in late October, 1966, are the same as are described as areas "A," "B" and "C" in said Exhibit. This conclusion is based on the fact that Exhibit A is a prospecting report made for Owens-Illinois by independent engineers known as Harry B. Cannon Associates and that such report shows the following quantity and quality of phosphate reserves:

	Reserves	BPL Content
Swift Creek Washer Area ("A")	"in excess of 50 million tons"	"71% to 73%"
East Washer Area ("B")	"exceed 9 million tons"	"average 72.3 percent"
White Springs Washer Area ("C")	"11 to 12 million tons"	"71% to 73%

The map accompanying this report shows each of these three washer areas to be located in Hamilton County. Their combined reserves are in excess of 70 million tons of saleable concentrate of at least 71 per cent BPL rock.

6. Neither the foregoing Occidental *Progress Report* nor the foregoing Kerr & Company brochure indicate that Occidental has any intention of constructing a second mine and plant in addition to Occidental's present Suwannee River Mine and adjacent Suwannee River Phosphate Chemical Complex, both of which are presently served by GS&F. The Kerr & Company brochure, at pages 5 and 6, states that the initial capacity of the $20 million Suwannee River Mine was "1.7 million tons a year, which has recently been expanded to 3 million tons per year," and that the annual capacity of the new $30 million chemical plant (Suwannee River Phosphate Chemical Complex) is "550,000 tons of chemical fertilizers." The brochure further states, at page 6: "Future Company plans include doubling again the mine capacity to 6 million tons per year and doubling the capacity of the chemical plant."

/s/ H. P. Osborne, Jr.
H. P. Osborne, Jr.

Sworn to and subscribed before me this ____ day of December, 1966.

.....
Notary Public, State of Florida

My Commission Expires: .....

[398] – Goldberg

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 23,461

GEORGIA, SOUTHERN and FLORIDA RAILWAY COMPANY,

Appellant,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(March 17, 1967)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, BELL and GOLDBERG, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.